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HUMAN RIGHTS COMMITTEE

Sixty-sixth session

SUMMARY RECORD OF THE 1757th MEETING

Held at the Palais des Nations, Geneva,
on Tuesday, 13 July 1999, at 3 p.m.

Chairperson: Ms. MEDINA QUIROGA

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The meeting was called to order at 3.10 p.m.

GENERAL COMMENTS OF THE COMMITTEE (agenda item 5)

Draft general comment on article 12 of the Covenant (CCPR/C/21/Rev.1/Add.9)

1. The CHAIRPERSON reminded the Committee that it had adopted paragraphs 1 to 10 of the draft general comment on article 12 (CCPR/C/21/Rev.1/Add.9) on second reading at its sixty-fifth session. She invited Mr. Klein, Rapporteur for the draft general comment, to introduce draft paragraph 11.

Paragraph 11

2. Mr. KLEIN (Rapporteur) said that paragraphs 11 to 18 dealt with restrictions that could be placed on the rights recognized in article 12, paragraphs 1 and 2, pursuant to paragraph 3 of the article. Paragraph 11 outlined the scope of paragraph 3. The reference in brackets at the end of the paragraph should be amended to read "see para. 18 below".

3. Ms. EVATT proposed deleting the word "these" before "restrictions" in the last sentence.

4. It was so agreed.

5. Paragraph 11, as amended, was adopted.

Paragraph 12

6. Mr. KRETZMER, referring to the last sentence of paragraph 12, said that article 12, paragraph 3, did not establish requirements for legislation restricting rights but stipulated that the restrictions themselves must be consistent with other rights recognized in the Covenant. He suggested that it should be amended to read: "If the restrictions provided in the law are not in conformity with the requirements of article 12, paragraph 3, they would violate the rights guaranteed by paragraphs 1 and 2".

7. Mr. WIERUSZEWSKI said that paragraph 12 contained two ideas, one concerning the form of restrictions and the other concerning their character. The formal requirement was that restrictions should be applied by statute. But the definition of a law or of an executive or administrative decree or order was not necessarily the same in different legal systems. The second requirement was that restrictions should be admissible under article 12, paragraph 3.

8. Mr. KLEIN (Rapporteur) said that the implication of the last sentence was that, even where a law was enacted, it could only impose such restrictions as were admissible under article 12, paragraph 3. Paragraph 12 was basically designed to set the stage for the points made in the subsequent paragraphs.

9. Mr. SOLARI YRIGOYEN inquired about the status of restrictions based on racial, religious or other forms of discrimination.

10. Mr. ZAKHIA said that the term "administrative decree" was a misnomer. Decrees were issued only by the Executive.

11. Mr. KLEIN (Rapporteur) suggested replacing "executive or administrative decrees or orders" by "executive decrees or administrative orders".

12. The question of discriminatory restrictions was addressed in paragraph 18 of the draft general comment. Such restrictions were, of course, inconsistent with other rights recognized in the Covenant.

13. Mr. LALLAH said that, under the common-law system, executive or administrative decrees or orders could also be described as "laws". They constituted "delegated legislation", i.e. rules, regulations or orders whose purpose was to implement a law enacted by Parliament. He proposed the following new version of the first two sentences of the paragraph: "Legislation itself has to provide the grounds upon which these rights may be restricted. Mere executive or administrative action not taken in pursuance of the law does not meet this standard". He wondered whether, under other legal systems, executive decrees were issued independently, i.e. not in pursuance of a basic law, and whether they could be challenged on the principle of ultra vires.

14. Mr. AMOR expressed support for Mr. Kretzmer's proposed amendment. He also proposed amending the first sentence of the paragraph to read: "The law itself, within the strict limits laid down by article 12 of the Covenant, has to establish the conditions under which rights may be limited".

15. In view of the differences between legal systems, he suggested replacing "executive or administrative decrees or orders" by "administrative regulations and decisions".

16. Mr. ZAKHIA supported Mr. Amor's proposed amendment to the second sentence.

17. Mr. KRETZMER said that, in the legal system with which he was familiar, the term "law" denoted a statute of Parliament and not delegated legislation. He proposed deleting the second sentence.

18. Mr. YALDEN supported the proposal to delete the second sentence.

19. Mr. KLEIN (Rapporteur) said that the requirement in article 12 that restrictions should be provided by law had a protective function for the individual. No member of a country's Executive could restrict individual liberties; only the Legislature was empowered to take such action. He agreed with Mr. Kretzmer's proposed amendment to the last sentence.

20. Mr. BHAGWATI said that laws could be enacted by Parliament or, for example, by presidential decree. He suggested the following amended version of the second sentence: "Orders or decisions which do not have the force of law do not meet this standard".

21. Ms. CHANET considered that it would be unwise to use terms that had contradictory meanings in different legal systems. In the area of movement of

persons, a law imposing restrictions might delegate authority to an administrative body to apply the law to individual cases, say in the interests of law and order. When a road was closed to traffic, for example, it was for the administrative authority to determine the scope of the restriction.

22. The third sentence of paragraph 12 made the key point that States should inform the Committee of the legal norms on which restrictions were founded so that it could determine whether they complied with the provisions of article 12.

23. Ms. EVATT said that restrictions should be imposed by laws of general application that specified the criteria to be applied in limiting rights. The point was that executive or administrative orders or decrees must fall within the scope of such laws of general application; if they did not, they would not meet the article 12 standard.

24. The CHAIRPERSON said that, under the legal system with which she was most familiar, all laws were of general application.

25. Mr. AMOR said that the law could be oppressive in a State that was not governed by the rule of law. That was why he had proposed his earlier amendment to the first sentence of paragraph 12.

26. Mr. KRETZMER said he could not support Mr. Amor's proposed amendment. The first sentence of paragraph 12 should simply state that restrictions must be enshrined in a law. The requirement of conformity with article 12 should be addressed separately.

27. Mr. KLEIN (Rapporteur) raised the hypothetical case of a State in which the President was empowered by the Constitution to expel an individual. He submitted that such acts should not be at the discretion of an individual office-bearer or an administrative body and that the empowerment of a dictator to enact legislation was incompatible with the Covenant. Restrictions on recognized rights could be imposed only by an authority that met the standards of a law-enacting body.

28. Ms. CHANET said that definitions of law were not identical, even in democratic countries. Decrees in certain democratic countries had the force of law and laws or even constitutions in certain dictatorships could be just as oppressive as administrative decisions by subordinate officials. The Committee's only option was to point out to States parties that a particular piece of legislation failed to meet the criteria laid down in article 12.

29. Mr. KLEIN (Rapporteur) said that, although he was not very happy with the idea of deleting the second sentence, he would not obstruct any consensus by pressing his point. The sentence made sense in the context, since States parties were requested to specify the legal norms upon which restrictions were founded. He was particularly concerned about States parties being allowed to make their own interpretation of the terms of the Covenant.

30. Mr. AMOR said he would prefer the second sentence to be retained.

31. Mr. KRETZMER said he was in favour of deleting the second sentence. However, he inquired whether there was any support for Ms. Evatt's implied amendment to the first sentence, namely that "The law itself" should be replaced by "A law of general application".

32. Mr. ZAKHIA shared Ms. Chanet's views: it would not be advisable to attempt to define what exactly had the force of law in each State party, for that would only complicate matters further. Any legislation, irrespective of its source, must be in conformity with the provisions of article 12. As to Ms. Evatt's point, in French the term "la loi" implied a law of general application.

33. Mr. YALDEN said he was not in favour of Ms. Evatt's amendment since, although it would be acceptable in the bilingual (French/English) Canadian context, it would undoubtedly pose problems for other States parties where different legal systems and languages were used.

34. Ms. CHANET said that, while allowances must be made for diverse legal systems, there must be some consistency between the different language versions of the text. She did not consider that Ms. Evatt's amendment could do much to resolve the problem under discussion.

35. Mr. POCAR said that it hardly seemed the time or place to engage in such lengthy, albeit interesting, discussion on the definition of the law. The Committee had adopted other general comments containing similar provisions without such ado. It would be more appropriate to take up such matters when considering the general comment on article 2, which dealt specifically with legislative measures. Thus, for the sake of simplicity, he would prefer to retain the original wording of the first sentence.

36. The CHAIRPERSON said she would take it, unless she heard any further objection, that the Committee wished to retain the original wording of the first and third sentences, to delete the second sentence and to amend the last sentence along the lines suggested by Mr. Kretzmer.

37. Paragraph 12, as amended, was adopted.

Paragraph 13

38. Mr. KLEIN (Rapporteur) said the purpose of paragraph 13 was to ensure that restrictions provided for by law permitted under article 12, paragraph 3, did not jeopardize the basic rights guaranteed by paragraphs 1 and 2 of the same article. In practice, some States parties placed so many restrictions on the law that it was virtually bereft of meaning, and what should be the exception became the rule.

39. Mr. ZAKHIA suggested that the French text of the last sentence should be aligned with the English and Spanish versions by replacing the words "toute latitude" by "pouvoir discrétionnaire".

40. Mr. POCAR, referring to the first sentence, suggested that "imposing" should be replaced by "providing for".

41. It was so agreed.

42. Ms. CHANET sought clarification regarding the second part of the first sentence, in particular the purpose of the statement "the relation between right and restriction, between norm and exception, must not be reversed". She also queried the sense of the last sentence, suggesting that either the way in which restrictions were applied should be elaborated upon or the sentence should be deleted.

43. Mr. KLEIN (Rapporteur) explained that the latter part of the second sentence served to emphasize the principle set forth in the first part, namely that restrictions provided for by law must not be so broad that the exception became the rule. In his view, the last sentence did make sense in the context, for if the law providing for restrictions conferred unfettered discretion on those charged with their execution, then the rights protected by article 12, paragraphs 1 and 2, could be undermined.

44. Mr. WIERUSZEWSKI suggested that "norm" should be replaced by "rule" in the first sentence. He also shared the disquiet expressed by Ms. Chanet about the last sentence.

45. Mr. ZAKHIA considered the last sentence necessary, for undeniably it was the practice of many States parties to make laws sufficiently broad for the administrative or political authorities to exercise substantial discretion. It should therefore be emphasized that restrictions must be sufficiently precise to avoid such situations.

46. Ms. EVATT also agreed on the importance of the last sentence, but felt that it belonged in paragraph 12.

47. Mr. BHAGWATI endorsed Ms. Evatt's remarks. It was important to make a statement about unfettered discretion, since it could lead to abuse.

48. Mr. LALLAH said he had been under the impression that paragraph 13 was about the implementation of the law. However, surely the word "unfettered" should not apply to "discretion" but to the law itself. In any case, discretion was not a wholly negative concept. The person responsible for applying the law must be allowed to exercise some discretion in certain circumstances, for instance when there was no threat to public order. He would therefore have no objection to the deletion of the last sentence.

49. Mr. AMOR suggested that paragraph 13 could be considerably simplified by some rearrangement of the following three basic ideas which it contained. First, restrictions should not impair the essence of the rights protected by the Covenant; second, such restrictions, which were exceptions to the rule, should be limited; third, the restrictions must not be applied in an arbitrary fashion. An illustration of where restrictions provided for by law undermined the basic rights enshrined in article 12, paragraphs 1 and 2, was in Viet Nam, where the competent authorities had extraordinary discretionary powers to refuse and grant residence permits.

50. The CHAIRPERSON, speaking in a personal capacity, said that Mr. Amor's third basic idea did not quite correspond to the last sentence of the

paragraph. It was not a question of too much discretion in the application of restrictions provided for by law, but rather that the law should not confer unfettered discretion on those responsible for their application. Evidently some confusion had arisen during the discussion owing to the application aspect. She suggested that the text would read much more clearly if the words "and applying" were deleted from the first sentence.

51. Ms. CHANET agreed that the question of application had caused some confusion. Now that had been cleared up, and since the Committee had decided the main focus of paragraph 12 should be whether restrictions provided for by law were in conformity with requirements of article 12, she saw no reason why the two paragraphs needed to be kept separate as they dealt with similar issues.

52. Ms. EVATT said that a more positive element should be introduced in the last sentence to make for a more balanced statement. She suggested the addition of the words: "should include precise criteria".

53. Mr. KLEIN (Rapporteur) welcomed the idea of merging paragraphs 12 and 13. Taking into account the amendments proposed, the second part of new paragraph 12 should now read: "In adopting laws providing for the restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. art. 5, para. 1); the relation between right and restriction, between rule and exception, must not be reversed. The laws authorizing the application of these restrictions should include precise criteria and may not confer unfettered discretion on those charged with their execution."

54. Following a further brief exchange of views with Ms. Chanet regarding the last sentence, the CHAIRPERSON said she would take it that the Committee wished to adopt the proposal to combine paragraphs 12 and 13 on the basis of the amended text for the latter read out by Mr. Klein.

55. It was so agreed.

Paragraph 14

56. Mr. KLEIN (Rapporteur) explained that the paragraph was intended to convey the idea that restrictions should be necessary in order to serve a permissible purpose, and should also be governed by the principle of proportionality.

57. Ms. EVATT proposed that in the second sentence the words "the least intrusive instrument amongst those intended to achieve the desired result" should be amended to read "the least intrusive instrument amongst those which might achieve the desired result".

58. Ms. CHANET proposed that in the same sentence the word "overriding" (before "interest") should be deleted.

59. Mr. KLEIN (Rapporteur) said he could accept those amendments.

60. Mr. POCAR said he wondered whether the example of refusal of a passport cited in the last sentence did not more properly belong in paragraph 15, which required that any proceedings relating to the restriction of rights should be expeditious. It did not seem to him to be directly linked to the principle of proportionality.

61. Mr. KLEIN (Rapporteur) said the example had been intended to illustrate the requirement in the previous sentence that restrictive measures should be proportionate to the overriding interest to be protected.

62. The CHAIRPERSON pointed out that now the word "overriding" had been deleted, the meaning of the previous sentence had changed and the example given became less relevant. She suggested that the last sentence should be deleted.

63. Paragraph 14, as amended, was adopted.

Paragraph 15

64. Mr. KRETZMER suggested that in the light of the amendment made earlier to paragraph 12, the words "by the legislature in framing the restrictions" should be replaced by "by the law that frames the restrictions".

65. Mr. KLEIN (Rapporteur) said that wording would be acceptable.

66. Paragraph 15, as amended, was adopted.

Paragraph 16

67. Ms. EVATT noted that the point made in the first sentence had already been covered. The paragraph should establish that there must be a clear link between the criteria governing the imposition of a restriction and the necessity for the restriction in order to serve an authorized purpose. In her view, the example given, stating that a certain restriction imposed on a holder of "State secrets" would be incompatible with article 12, was too imprecise.

68. Mr. KLEIN (Rapporteur) said the examples given were intended to be illustrations of cases where precise criteria were in fact lacking. Thus, although restrictions on the freedom of movement of holders of "State secrets" could be subsumed under "national security", and requirements for internal residence permits could be subsumed under "public order", it was not clear whether they really served the purpose intended. The paragraph contained two ideas: first, the restrictions should not be too broad, and second, they should be necessary to protect the interests at stake.

69. Mr. KRETZMER said the example given of a requirement for internal residence permits was not relevant to the need for precise criteria: the question was rather whether such a requirement was in fact legitimate, even if it was claimed that it was in the interests of public order. The issue of legitimacy should be dealt with separately from the issue of precise criteria. With reference to the penultimate sentence, he did not think it was

appropriate in the general comments to tell States parties what they should do. He suggested that "are unacceptable" or " do not meet the criteria" should be substituted for "should be abolished".

70. Paragraph 15 rightly distinguished between the law itself and the way the law was administered. However, he was not clear what point was being made in paragraph 16 by citing the example of a holder of "State secrets". Was it implied that such a person should be specifically defined in law or that he should be specifically defined in judicial decisions applying it?

71. Mr. KLEIN (Rapporteur) said his meaning had been that it was not enough to claim that a right could be restricted in the interests of "national security", and to leave it to the Administration to decide whether or not a particular case should be subsumed under that term. There should be precise criteria in order to enable the Administration or the Judiciary to execute the law: it was not sufficient simply to invoke concepts such as "national security". However, he agreed that it was perhaps better not to try to combine two different ideas in the same paragraph. The first two examples given, which concerned the need for precise criteria, could be added at the end of paragraph 13.

72. The CHAIRPERSON said that for her part she had great difficulty in agreeing to the third sentence beginning "States should instead specifically define the groups whose departure would pose real risks to national security". The penultimate sentence, citing the example of restrictions imposed on vagrants, should be deleted, since it was not a question of whether such laws were open to abuse but rather of whether they were admissible in the first place.

73. Ms. EVATT said the aim of the paragraph was to emphasize the importance of using criteria sufficiently precise to show that application of a restriction was in conformity with article 12, paragraph 3, of the Covenant and was necessary to serve an authorized purpose. Regarding the example of holders of "State secrets", it would be better to require that States should specifically define the circumstances in which the departure of certain persons would pose a threat to State security.

74. Mr. KRETZMER said that, in his view, paragraph 16 laid down standards which States would find themselves unable to comply with. It was impossible for the law to foresee all circumstances that might arise, and it was therefore particularly important to insist that unfettered discretion should never be allowed in its application. He himself would see nothing wrong with a general law allowing restrictions to be imposed in the interests of national security, provided that every case in which that law was applied was made subject to judicial review to ensure that it met the necessary criteria. That was the approach followed by most States, since it would not be possible in practice to define every circumstance in which such restrictions could be imposed.

75. Mr. AMOR agreed that the law could not regulate every aspect of life. The difficulty arose from the fact that the Committee was dealing with restrictions justified by reference to abstract concepts, the meaning of which varied from country to country. What was needed was to ensure that concepts

such as "national security" were not applied arbitrarily or used as an alibi to bolster a particular regime. The State party should be required to demonstrate that the restrictions were necessary and governed by precise criteria, it being understood that precision in such a context had its limits.

76. Mr. KLEIN (Rapporteur) said his intention in paragraph 16 had been to require States parties to be more diligent in framing laws which invoked such concepts.

77. Ms. CHANET said the reference to "State secrets" should be deleted. The concept was a totalitarian one, and the Committee should not appear to be giving it recognition by including it in the text. In the same way, reference should not be made to "anti-social elements": the Committee should not draw attention in its general comments to wrongful actions perpetrated by States, even to condemn them, but should rather emphasize basic principles.

78. Mr. SOLARI YRIGOYEN considered that the paragraph was too long and the examples given too imprecise. It was difficult, if not impossible, to define exactly what the law should be in matters of national security. For instance, the term "terrorist activities" could be interpreted in different ways in different countries, according to the law in which such activities were defined.

79. Mr. KRETZMER proposed that the paragraph should include a sentence along the following lines: "Although the law may often use general terms in defining permissible restrictions, when applied in specific circumstances the precise criteria requiring restriction of the right must be defined, and those criteria must meet the test of necessity and the requirements of proportionality."

80. Mr. ZAKHIA said that the concept of ordre public contained a subjective element which could vary from country to country. The examples in paragraph 16 could be construed as an expression of Eurocentricity on the part of the Committee. He preferred the wording proposed by Mr. Kretzmer.

81. The CHAIRPERSON did not agree with the view that the ordre public criterion was variable from country to country.

82. Mr. LALLAH said that he was inclined to agree with Mr. Zakhia. The examples cited in the paragraph were mostly drawn from the practice of totalitarian systems which had now disappeared. A text along the line suggested by Mr. Kretzmer would be more appropriate.

83. Mr. KLEIN (Rapporteur) said that he had thought it useful to include examples drawn from the Committee's own jurisprudence. However, if members preferred a more general formulation, he was quite prepared to accept Mr. Kretzmer's text, which expressed very much what he himself had wanted to say. The paragraph would then read:

> "Although the law may often use general terms, in defining permissible restrictions when applied in specific circumstances the precise

criterion under which the restriction is required must be provided. These criteria must meet the necessity test and the requirements of proportionality."

84. Ms. EVATT said that she could not agree to that formulation, which suggested that it might be up to an administrative officer, or even the Judiciary, to work out the criterion for applying the restriction. The law should make it clear in advance how the criterion was to be applied, and the criterion must be sufficiently precise to show that its application was in conformity with article 12, paragraph 3.

85. Mr. KRETZMER considered that any attempt to define precise standards in such areas as, for example, national security or public order was bound to prove impracticable and, indeed, counter-productive. New circumstances could arise at any time and it was impossible to legislate in advance for each individual case.

86. Mr. LALLAH agreed with that view.

87. Ms. CHANET said that she would be prepared to endorse the wording proposed by Mr. Kretzmer provided it was made quite clear that the restrictions referred to were not necessarily of an individual nature but could extend to whole sectors of the population.

88. Mr. BHAGWATI said that, like some of the previous speakers, he was in favour of dropping the examples given in paragraph 16. The text suggested by Mr. Kretzmer seemed satisfactory in that it required each decision taken in a specific case to be relatable to the legitimate grounds for restriction listed in article 12, paragraph 3, and also to satisfy the tests of proportionality and necessity.

89. Ms. EVATT remarked that the general guidelines which the Committee wanted to apply were set out with sufficient clarity in paragraphs 12 and 13, as amended. She supported Mr. Klein's idea of giving examples from the Committee's own jurisprudence.

90. After a further exchange of views in which Mr. YALDEN, Mr. KLEIN (Rapporteur), Mr. KRETZMER, Ms. EVATT and Ms. CHANET took part, the CHAIRPERSON suggested that the discussion on paragraph 16 should be left in abeyance pending the circulation in writing of the text proposed by Mr. Kretzmer and accepted in principle by Mr. Klein.

91. It was so agreed.

Paragraph 17

92. Mr. KLEIN (Rapporteur) said that the paragraph dealt with other areas in which people were prevented from enjoying the right to liberty of movement. The examples given in the paragraph, which were certainly not exhaustive, were drawn from the Committee's own experience involving a large number of countries.

93. Mr. POCAR, pointing out that most of the examples seemed to be linked with the issue of proportionality, proposed the deletion of the fourth sentence of the paragraph, beginning with the words "Many of these impediments". He also proposed that the words "erected against" after the word "barriers" in the first sentence should be replaced by the words "unnecessarily affecting". Bureaucratic obstacles to liberty of movement - which were found in almost every country - were rarely, if ever, based on necessity.

94. Mr. SOLARI YRIGOYEN said that he had no objection to the paragraph, although a little condensation might be in order. The first sentence, in addition to referring to the rights of individuals to move freely and to leave the country, including their own, should also include a mention of the right to take up residence.

95. Mr. KLEIN (Rapporteur) said that he was prepared to accept all those suggestions.

96. Ms. EVATT suggested that the word "inaccessibility" near the beginning of the fifth sentence should be replaced by "lack of access".

97. Mr. ZAKHIA suggested that the word "unjustified" should be inserted before the word "obstacles" in the third sentence.

98. The CHAIRPERSON noted the emergence of a consensus in favour of the deletion of the fourth sentence.

The meeting rose at 6 p.m.